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Nos. 90-1721, 90-1725, 90-1760 and 90-1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

VERMONT DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,
Respondents.

[Caption Continued on Inside Cover]

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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REPLY OF VERMONT DEPARTMENT OF PUBLIC SERVICE TO BRIEFS OPPOSING ITS PETITION FOR A WRIT OF CERTIORARI

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COUNTY OF WESTCHESTER PUBLIC UTILITY SERVICE AGENCY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Et Al.,

Respondents.

JAMES E. O'NEIL, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND, Et Al.,

Petitioners,

v.

NEW YORK CITY PUBLIC UTILITY SERVICE, Et Al.,

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ARGUMENT

I. *CHEVRON* IS INAPPLICABLE WHERE AN AGENCY ADOPTS A STANDARD BASED ON THE MISTAKEN ASSUMPTION THAT THE STANDARD IS MANDATED BY STATUTE, CASE LAW OR LEGISLATIVE HISTORY

Respondents in this case, the Federal Energy Regulatory Commission (FERC) and several parties who intervened in support of FERC in the case below,[1] have filed briefs in opposition to the petition for writ of certiorari filed by the Vermont Department of Public Service (VDPS or Vermont). However, neither FERC nor those supporting it questioned this basic proposition of law presented in Vermont's petition: If an agency wrongly believes that its application of an ambiguous statute is mandated by law it has not exercised its own discretion and is not entitled to deference from a reviewing court under *Chevron*.[2]

VDPS demonstrated in its petition that FERC erroneously believed the control criterion incorporated into its definition of "public body" was mandated by the Niagara Redevelopment Act (NRA). FERC's response does not refute this point, but indicates that FERC *still* believes its control criterion was mandated by the Act. According to FERC, the control requirement is a "logical interpretation of the precedent." FERC Br. pp. 11-12. The Second Circuit, however, already has said that neither the statute itself nor

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[1] The Connecticut Municipal Electric Energy Cooperative and the Massachusetts Municipal Wholesale Electric Company, the Allegheny Electric Cooperative, Inc., City of Cleveland, the Municipal Electric Utilities Association of New York State, and the Public Power Association of New Jersey.

[2] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*").

prior case law mandates any of the several public body criteria adopted by FERC (14a). Where an agency has been proceeding on a "mistaken assumption" about the statute, it is not for the reviewing court to supply a justification on the agency's behalf. *Dept. of Treasury v. FLRA*, 110 S. Ct. 1623, 1629-30 (1990). *See also Phillips Petroleum Co. v. FERC*, 792 F.2d. 1165, 1169 (D.C. Cir. 1986). Thus, even if an independent rationale for the control criterion could be devised and defended by FERC in the exercise of its discretion, it has not exercised that discretion here and, contrary to the Second Circuit's holding, is not entitled to deference under *Chevron*. *Id.*

The brief of intervenors in support of FERC similarly reinforces rather than defuses Vermont's argument. Intervenors do not dispute that FERC believed itself bound to adopt the control criterion. Instead, they advance the curious argument that the source of FERC's belief was the legislative history of the NRA, rather than prior case law:

> The Commission did not state (at the page cited, or anywhere else in its decisions) that the *MTA* opinion requires that a 'public body' control a distribution system; instead, the Commission stated that 'the court [in *MTA*] cited *legislative history* requiring that the 'public body' must control distribution.' Opinion No. 329, P.A. at 86 (emphasis added). *The FERC's reliance then was not on MTA but on the legislative history discussed in MTA.*[3]

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[3] *"MTA"* refers to *Metropolitan Transportation Auth. v. FERC*, 796 F.2d 584 (2d Cir. 1986), *cert. denied sub nom. Allegheny Electric Cooperative, Inc. v. FERC*, 479 U.S. 1085 (1987).

Int. Br. at 12-13 (emphasis added.)

This is a distinction without a difference. Whether FERC misread prior case law or legislative history, its decision is not entitled to deference if it erroneously "believe[d] the standard to be dictated by the statute itself" rather than "adopted as a matter of policy in order to effectuate the purposes of the Act." *International Brotherhood of Electrical Workers v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987). See also *Planned Parenthood Federation of America v. Heckler*, 712 F.2d 650, 666 (D.C. Cir. 1983) (Bork, concurring in relevant part.) The *source* of FERC's error, i.e., the text of the statute, the legislative history or prior case law, is plainly irrelevant.[4] "When the [agency] bases a decision on a standard that it unjustifiably believes was mandated by Congress, the [agency's] decision must not be enforced, even though the [agency] might be able to adopt the very same standard in the exercise of its discretion." *International Brotherhood*, 814 F.2d at 708. Here, FERC's mistaken assumption that a public body is required to have physical control of a distribution system was an error which clearly "infected its promulgation" of a public body definition, *Planned Parenthood*, 712 F.2d at 667,[5] and the Second Circuit incorrectly applied *Chevron* when it deferred to that definition.

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[4] See, e.g., *Prill v. NLRB*, 755 F.2d 941, 952 n.66 (D.C. Cir.) *cert. denied* 474 U.S. 948 (1985) (NLRB found to be "mistaken in its view that the language, history *and* prior interpretation of § 7 left it without discretion to consider adopting a broader interpretation of the [NLRA] Act." (emphasis added)).

[5] Intervenors supporting FERC appear to argue that the agency's decision is sustainable on the basis of its "separate" direct responsibility criterion. Int. Br. pp. 13-14. However, as Vermont

II. DEFERENCE, IF ANY, WAS DUE PASNY, NOT FERC.

If the Second Circuit owed any deference in this case, it was to the Power Authority of the State of New York (PASNY), not FERC. Vermont Pet. pp. 15-16. FERC responds to this argument by asserting that, unlike *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171 (1991) (*Martin*), this case involves no "split enforcement" structure and that "it is the Commission in which Congress has reposed responsibility to enforce the legislative will." FERC Br. p. 13.

Intervenors supporting FERC unwittingly, but directly, refute this assertion with a passage from one of FERC's own orders. Maintaining that "prior precedents dispose of the VDPS argument" (Int. Br. at 20), Intervenors cite FERC's statement in Opinion No. 151 that *"Congress (in the NRA) delegated the administrative responsibilities to PASNY, and the supervisory responsibilities to the Commission." Id.* (quoting *MEUA v. PASNY* (Opinion No. 151), 21 FERC ¶ 61,021, at 61,126 (1982) (emphasis added).[6]

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noted in its petition, the Commission treated these criteria interchangeably, affirming its Administrative Law Judge's decision that "to be directly responsible, a public body * * * must control the distribution system." (73a). In any event, under *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943), a reviewing court may not assume that, unencumbered by its erroneous view that the control criterion was required, FERC would have adopted the same definition of public body. *See also, Dept. of Treasury v. FLRA*, 110 S. Ct. at 1629-30.

[6] Citing this Court's per curiam decision in *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328 (1945), Intervenors also assert that since the *Martin* issue was not raised before the Second Circuit it cannot form the basis for granting a writ of certiorari. Int. Br. p. 19. This Court, however, has no such

This separation of functions brings the instant case squarely within the framework of *Martin*, which, in turn, overrides any prior FERC assertions that PASNY is not entitled to deference. The Occupational Safety and Review Commission's (OSHRC) role, as described in *Martin*, was not policy-fashioning, but adjudicatory. Because the Secretary of Labor, not OSHRC, had day-to-day responsibilities for administering the statute, the Court held that Congress intended to invest interpretative power in the Secretary. *Martin*, 111 S. Ct. at 1177. Similarly, it is PASNY, not FERC, which bears responsibility for allocating preference power, setting rates for that power and assuring its transmission. FERC's self-described role in the process is purely adjudicatory:

> We leave it to PASNY in the first instance to determine the legality of such arrangements. We will exercise our responsibilities to resolve any disputes as they arise through the complaint process established by the NRA and the FPA.

Opinion No. 229-A, 32 FERC ¶ 61,194, at 61,451 n.12 (1985).[7] In these circumstances the Second Circuit should not have deferred to FERC.

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ironclad standard. See *Vance v. Terrazas*, 444 U.S. 252, 258, n.5 (1980); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons Inc.*, 340 U.S. 211, 214 (1951). More important is that the error cited in Vermont's petition was the Second Circuit's decision to defer to FERC. That error did not occur *until* the Second Circuit rendered its opinion. Finally, the *Martin* decision was not issued by this Court until *after* the Second Circuit's decision. The applicability of an intervening decision of this type is an appropriate subject of a petition for writ of certiorari. *Vandenbank v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941).

[7] FERC's further assertion that it should be given deference

III. THE SECOND CIRCUIT ERRED IN DEFERRING TO AN AGENCY STANDARD WHICH DENIES PUBLIC BODY STATUS TO PUBLIC ENTITIES WHICH SATISFY THAT COURT'S OWN STATED UNDERSTANDING OF THE STATUTE'S INTENT

FERC correctly observes that under the Second Circuit's 1986 decision in *MTA* the " 'crystal clear' intent of the statutory preference for public bodies is to promote yardstick competition." (FERC Br. p. 5, 14). Yardstick competition itself, it bears repeating, is not a term found in the statute. If, however, promotion of yardstick competition is the purpose of the NRA, then public entities which provide yardstick competition must be public bodies. Conversely, any definition of public bodies that denies public body status to such yardstick competitors is inherently arbitrary and cannot be entitled to deference from a reviewing court. The Second Circuit held in *MTA* that public entities whose retail rates can be compared by regulators to those charged by private utilities provide

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because its "responsibilities under the FPA extend to federal power projects across the nation", thereby giving it "greater expertise than PASNY to decide issues concerning the allocation of power" (FERC Br. p. 13), is simply untrue. While FERC has a very limited, "appellate body" role in *rate*-setting for federal power marketing agencies, *United States v. City of Fulton*, 475 U.S. 657, 663 (1986); *CP National Corp. v. Bonneville Power Administration*, 928 F.2d 905, 911 (9th Cir. 1991), most agencies charged with marketing federal preference power *allocate* that power without *any* FERC role, even an adjudicatory one. (The various federal preference power statutes are identified in Vermont's petition, p. 11 n.9). Where reviewing courts have found an ambiguity in the statutory allocation scheme, they have given those agencies deference. See, *e.g.*, *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991). PASNY, not FERC, is the counterpart of those agencies.

yardstick competition. As VDPS has pointed out, there was no dispute from the Commission that VDPS provided the requisite regulatory yardstick. *Id.*[8] VDPS argued, therefore, that the Second Circuit's error was in deferring to a FERC definition of yardstick competition which expressly held that only public entities which facilitated consumer comparisons, not regulatory comparisons, would qualify as public bodies. Vermont Pet., p.20. When FERC adopted a standard holding that only *some* yardstick competition qualifies, it strayed so far from the statutory text as to remove any basis for a court to defer to its interpretation. *Id.*

FERC simply has no answer to this argument. Instead, it answers an argument VDPS never made. According to FERC, VDPS has contended that "Congress intended *only* regulators, not consumers, to compare the service offered by private utilities to that offered by public utilities." FERC Br. p. 15 (emphasis

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[8] Vermont petition, p. 20 (citing *MTA*, 796 F.2d at 592). Oddly, FERC accuses Vermont of error "in treating the court's statement [in *MTA*] as if it were statutory text." FERC Br. p. 15. It is FERC which has adopted a public body definition wholly divorced from the text of the statute. Indeed, in the same paragraph of its brief where FERC criticizes Vermont for reliance on the Second Circuit's *MTA* decision, FERC cites the decision for the proposition that the NRA *requires* a public entity to control a distribution system in order to qualify as a public body—the very proposition which the Second Circuit *did* reject in the case now before this Court (14a).

added).[9] VDPS has never contended that a public entity whose rates and services can be compared by consumers to those of private utilities is not a public body.[10] The Second Circuit's error was in affirming a public body definition which excluded public entities capable of providing a regulatory yardstick, *i.e*, yard-

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[9] FERC misstates another argument made by Vermont in attempting to bolster its claim to deference. According to FERC, VDPS has ignored the requirement of *MTA* that a public body be "capable of selling *and distributing* power directly to consumers at retail," FERC Br. p. 15 (quoting *MTA* 796 F.2d at 593 (emphasis in original)), and instead has argued that "competition in a regulated industry can be achieved without requiring 'yardstick competition'." FERC Br. p. 16 n.6. Vermont has argued nothing of the sort. In *MTA* the Second Circuit held that "*[y]ardstick competition would exist if publicly-owned utilities competed against privately-owned utilities in selling power to ultimate consumers.*" 796 F.2d at 592 (emphasis added). What Vermont has pointed out is that, as in the telecommunications and natural gas industries, access to, not control of a distribution system is all that is necessary to compete in selling and distributing power to ultimate consumers (Pet. pp. 27-28), and that FERC had never given a reasoned explanation why more was demanded of a public body. *Id.* The lower court itself seems erroneously to have assumed that only "active management control over the distribution of preference power" was being required (17a) rather than the complete *operational* control of the distribution facilities actually required in Opinion No. 329 (73a, 80a-83a, 88a). Management control over the distribution of preference power, of course, is achieved if the public body has *access* to the facilities used to distribute its power (36a).

[10] On the contrary, we argued to the lower court—and reiterated in our petition here—that FERC erred in failing to consider a Vermont statute which mandates a comparison on consumer bills between the rates of VDPS and private utilities (Vermont pet. p. 7, n. 7; 20a, n.1).

stick competition as that court *itself* had defined the term.

Respectfully submitted,

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